

RECORDING REQUESTED BY:
Community Development Commission
City of National City
140 E. 12th Avenue
National City, California 91950
Attn: Redevelopment Director

WHEN RECORDED, MAIL TO:
Dept. of Environmental Health
County of San Diego
1255 Imperial Ave, 3rd Floor
San Diego, California 92101
Attn: George McCandless

Department of Toxic Substances Control
5796 Corporate Avenue
Cypress, California 90630
Attn:
Southern California Cleanup Operations

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

COVENANT TO RESTRICT USE OF PROPERTY

ENVIRONMENTAL RESTRICTION

For Property at:

2501 and 2510 Cleveland Ave.
National City, California

San Diego County Assessor's Parcel Nos.: 559-160-03, -09, -11, and -21; and 559-117-14 and 15.

INTRODUCTION

This Covenant ("Covenant") is made by the Community Development Commission of the City of National City, a body corporate and politic (the "Covenantor"), the current owner of property situated in National City, County of San Diego, State of California, described in Exhibit "A", attached hereto and incorporated herein by this reference (the "Property"). This Covenant is made for the benefit of the County of San Diego ("County"), a political subdivision of the State of California. This Covenant shall run with the land that constitutes the Property. Successive owners of the Property or any part thereof are bound by this Covenant for the benefit of the County in perpetuity. Covenantor and County intend this Covenant to fulfill the requirements and to have the effects set out in section 1471 of the California Civil Code.

STATEMENT OF FACTS

1.01 The Property is more particularly described in Exhibit "A", attached hereto and incorporated herein by this reference. Exhibit "B", attached hereto and incorporated herein by this reference, depicts the Property boundaries. The Property is located in the area now generally bounded by Paradise Marsh to the south, Bay Marina Drive (24th Street) to the north, the I-5 Freeway to the east, and Marina Way to the west, City of National City, County of San Diego, State of California. This Property is more specifically described as San Diego County Assessor's Parcel Nos.: 559-160-03, -09, -11, and -21; and 559-117-14 and 15.

1.02 In 2000, the County Department of Environmental Health (DEH) was appointed as the "administering agency" for the mitigation of environmental conditions at the Property pursuant to Chapter 6.65 of Division 20 of the California Health and Safety Code (sections 25260, et seq.). ("Unified Agency Review of Hazardous Sites Law"). The California Integrated Waste Management Board conducted mitigation activities on the portions of the Property.

1.03 In its capacity as administering agency DEH has supervised all aspects of the site investigation and remedial action necessary to respond to the hazardous materials releases on the Property that have so far been completed on the Property. DEH has determined in consultation with other environmental agencies the further acts that must be done or refrained from on the portion of the Property where remedial action has been completed, to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials, as defined in Section 25260 of the Health and Safety Code.

1.04 The Property Mitigation Plan (PMP) prepared and approved under the oversight of DEH, provides that a deed restriction be required as a result of the "capping in place" of materials on a portion of the Property which required remediation. The location and extent of the "capped" area of the Property below which hazardous materials are located is indicated in Exhibit "C". The PMP identifies burn ash constituents, including lead, arsenic, chromium, copper, mercury, zinc, polychlorinated biphenyls, and naphthalene, which are hazardous substances as defined in H&SC Section 25316, which are hazardous materials as defined in H&SC Section 25260, and which will remain at elevated levels in the fill materials to depths of approximately 24 to 26 feet below grade of the ground surface (bgs) on portions of the Property below the "cap" and the pavement above it. DEH approved the PMP on April 16, 2003, which requires the recording of this Deed Restriction on the Property with the County of San Diego, as detailed in the Final PMP prepared by Environmental Business Solutions, Inc., a division of SCS Engineers, as approved by the Department. As a result of the assessments and mitigation activities that have been conducted to date, the previously referenced hazardous materials and hazardous substances, as defined in H&SC sections 25316, are found onsite. These hazardous materials/substances are located at the Property within the area shown in Exhibit "C" as follows:

At depths of 0 to 2 feet bgs; Asphaltic pavement and clean imported fill soil.

At depths of 02 to 26 feet bgs; Burn ash mixed with soil.

1.05 Contaminants beneath the cap depicted in Exhibit "C" may pose a threat to human health if the cap is damaged or penetrated. Based on the Final PMP DEH concluded that use of

the Property does not present an unacceptable threat to human safety or the environment if the integrity of the cap that has been placed over the hazardous materials is maintained. Pursuant to Title 27 of the California Code of Regulations, the Community Development Commission of the City of National City, in May 2007, prepared a Post Closure Monitoring and Maintenance Plan (PCMMP) and the County of San Diego Solid Waste Local Enforcement Agency has reviewed and approved this plan. DEH has relied on installation and continued maintenance of the capped portion of the Property to support the conclusion that remedial action in this area was satisfactory.

1.06 In its capacity as administering agency DEH has determined that soils within the non-capped portion of the Property were remediated to levels safe for commercial land use. Exhibit "B" depicts the Property, including the capped and non-capped area.

1.07 Further information about the site investigation and remedial action efforts at the Marina Gateway Hotel Project formerly Cleveland and Cuyamaca Properties can be obtained from reviewing the files maintained by DEH Voluntary Assistance Program (VAP) Case Nos. H23772-002 and Local Oversight Program (LOP) case Nos. H23772-003 and specifically the 2007 Property Closure Report prepared by SCS Engineers.

ARTICLE II **DEFINITIONS**

2.01 County Department. "County Department" or "DEH" means the Department of Environmental Health for the County of San Diego and includes its successor agencies, if any.

2.02 Owner. "Owner" means the Covenantor, its successors in interest, and their successors in interest, including heirs and assigns, who hold title to all or any portion of the Property.

2.03 Occupant. "Occupant" means Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

ARTICLE III **GENERAL PROVISIONS**

3.01 References to state law. References to state laws shall be construed to refer to the cited section of state law as it existed on the date this Covenant was made, or to successor and supplemental provisions of state law, as necessary to give effect to the principle purpose of this Covenant: to enable the County to protect present and future human health and safety and the environment by restricting the use of the Property and by prohibiting activities on the Property, in perpetuity.

3.02 Applicability. The terms of this Covenant pertain to the entire Property, and to any part thereof, and to every Owner of the Property.

3.03 Term. This Covenant is effective upon signature by the Community Development Commission of the City of National City. Unless ended in accordance with the Termination

paragraph in Article VI below, by law, or jointly by the Owner and the County in the exercise of their discretion, this Covenant shall continue in effect in perpetuity.

3.04 Warranty of Ownership. Covenantor warrants that as of the date this Covenant was made, Covenantor was the owner of the entirety of the Property.

3.05 Relationship to the Property. Each act that the Owner will do or refrain from doing on his land pursuant to this Covenant relates to the use of the Property.

3.06 Necessity. Covenantor acknowledges that DEH has determined, based on its supervision of all aspects of the site investigation and remedial action conducted on the Property, that the acts the Owner is required to do or refrain from doing on the Property pursuant to this Covenant are each reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials, as defined in Section 25260 of the Health and Safety Code, and will remain necessary in perpetuity.

3.07 Necessity. Covenantor admits and agrees that the covenants made herein to do or refrain from doing acts on the Property are each reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials, as defined in Section 25260 of the Health and Safety Code, and will remain necessary in perpetuity.

3.08 Restrictions to Run with the Land. This Covenant sets forth protective provisions, covenants, restrictions, requirements and conditions (collectively referred to as "Restrictions" or as "Restrictions and Requirements"), subject to which the Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and every Restriction: (a) runs with the land pursuant to Civil Code Section 1471; (b) inures to the benefit of and passes with each and every portion of the Property; (c) is for the benefit of the County; and (d) is enforceable by the County pursuant to state law regarding covenants and pursuant to Article V of this Covenant. This Covenant restricts activities and uses only upon the capped portion of the Property depicted in the attached Exhibit "C".

3.09 Waste Disposal Site Boundary, Closure Date, and Applicable Regulatory Requirements. Portions of the Property may have been "closed" as a waste disposal site prior to November 18, 1990 in accordance with the minimal requirements applicable at the time waste disposal ceased. Notwithstanding any such prior closure, Owner covenants that Owner will not contest that for purposes of state and local laws and regulations pertaining to closed disposal sites (including but not limited to requirements for post-closure permitting, payment of closed disposal site permitting fees, and post-closure maintenance), closure of the capped portion of the Property shown in Exhibit "C" was not completed until 2006. The recording of this Covenant is intended to fulfill the requirements for notice of closure of a waste disposal site contained in California Code of Regulations, Title 27, Section 21170.

3.10 Post Closure Obligations. Owner covenants that Owner will fulfill the requirements of the PCMMP for the portion of the Property above the capped area indicated in Exhibit "C"

3.11 Binding upon Owners/Occupants. This Covenant binds all Owners of the Property including their successors, heirs and assigns; and in addition to the extent allowed by law binds the assignees, agents, employees, and lessees of Owners. Pursuant to this Covenant and Civil Code Section 1471(b), all successive owners of the Property are expressly bound hereby for the benefit of the County.

3.12 Other Applicable Law. Compliance with this Covenant does not relieve Owner of any obligations under other applicable law, regulation, ordinance, permit, or order.

3.13 Written Notice of the Presence of Hazardous Substances. Filing or recording this Covenant does not constitute compliance with and shall not relieve any Owner from his obligation to comply with the requirements of Section 25359.7 Health & Safety Code in connection with a particular sale, lease or rental of the Property or a portion thereof. (Section 25359.7 requires an owner of nonresidential real property who knows or has reasonable cause to believe that a release of hazardous substance is located on the property to provide written notice of such condition to a buyer, lessee or renter of the property prior to a sale, lease or rental of the property.)

3.14 Governmental Powers. This Covenant does not restrict or limit the scope or use of the legislative or regulatory powers of the County, DEH, or any other County agency. The County may exercise these powers or may decline to exercise these powers with respect to the Property and any Owner or Occupant as it deems appropriate whether or not this Covenant is applicable or is invoked in any future circumstances.

3.15 Notice of Conveyances of Property. Covenantor and County request that each Owner provide notice to DEH not later than thirty (30) days after any conveyance of any ownership interest in the Property (excluding mortgages, liens, and other non-possessory encumbrances).

3.16 Incorporation into Deeds, Leases and Subleases. Covenantor and County request that each Owner or Occupant, from and after the date of recordation of this Covenant, incorporate the Restrictions and Obligations set forth herein into each and all deeds and leases for any portion of the Property; and further request that each Owner or Occupant include in any instrument conveying any interest in all or any portion of the Property, including but not limited to deeds, leases, and mortgages, a notice which is in substantially the following form:

NOTICE: THIS PROPERTY IS COVERD BY AN ASPHALT CAP TO ISOLATE HAZARDOUS SUBSTANCES. THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL RESTRICTION AND COVENANT TO PROHIBIT ANY MODIFICATION TO THE CAP, TO PROHIBIT ANY SOIL DISTURBANCE BENEATH THE CAP, AND TO PROHIBIT CERTAIN USES OF THE PROPERTY, IN PERPETUITY. THE INSTRUMENT THAT SETS OUT THESE RESTRICTIONS IN FULL IS RECORDED IN THE OFFICIAL RECORDS OF THE OFFICE OF THE SAN DIEGO COUNTY RECORDER ON [DATE], FILE NO. _____.

ARTICLE IV
RESTRICTIONS AND REQUIREMENTS

4.01 Prohibited Uses. The Property shall not be used for any of the following purposes:

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation.
- (b) A hospital for humans.
- (c) A public or private school for persons under 21 years of age.
- (d) A day care center for children.

These uses may only occur if a variance, modification or termination allowing one or more of these uses is granted by the County as discussed below in Article VI.

4.02 Prohibited Activities.

(a) No activities shall be allowed on that portion of the Property above the capped area indicated in Exhibit "C" that would disturb the soil including but not limited to excavation, grading, removal, trenching, filling, earth movement or mining activities, unless such activities occur under the authority of a variance issued pursuant to Article VI of this Covenant.

(b) No activities shall be allowed on that portion of the Property above the capped area indicated in Exhibit "C" that would compromise the integrity of the asphalt cover on the Property as a barrier to human contact with hazardous substances, unless such activities occur under the authority of a variance issued pursuant to Article VI of this Covenant.

(c) Any contaminated soils at the Property which are brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law.

(d) The Owner shall provide the Department written notice at least fourteen (14) days prior to any building, filling, grading, mining or excavating in the Property soils.

4.03 Access. Owners shall provide the County and DEH and their respective designees reasonable right of entry and access to the Property for inspection, monitoring, and other activities consistent with the purposes of this Covenant as deemed necessary by the County or DEH.

4.04 Cure, Cure upon Notice, Cure Prior to Conveyance. Each Owner must promptly correct to the satisfaction of County any act done or omitted by him on the Property in violation of this Covenant, unless that act was done or omitted pursuant to a variance issued by DEH as provided in Article VI of this Covenant. This obligation accrues upon the doing or omitting of any act in violation of the Covenant, is renewed upon notice by the County or DEH, and is applicable regardless of notice or the absence thereof prior to any conveyance of any part of the Property.

4.05 Obligation of Successive Owners to Cure. Notwithstanding Section 1446 of the Civil Code, as a separate covenant imposing an obligation to act concurrent with ownership, each Owner of any part of the Property shall promptly correct to the satisfaction of County any act done or omitted by a prior Owner on that part of the Property in violation of this Covenant, unless that prior act was done or omitted pursuant to a variance issued by DEH as provided in Article VI of this Covenant. This obligation accrues regardless of notice or disclosure or the absence of notice or disclosure by the prior Owner or the County.

ARTICLE V **ENFORCEMENT**

5.01 The County may enforce this Covenant as provided by state law. This may include but is not limited to requiring any Owner to modify or remove any improvements placed on the portion of the Property above the capped area indicated in Exhibit "C," requiring that prohibited uses of the Property be discontinued, and requiring that the cap on the Property be restored.

5.02 The failure of the County to enforce this Covenant shall not constitute a waiver of the County's power to enforce this Covenant.

5.03 This Covenant is also enforceable by the State of California pursuant to section 25355.5(a)(1)(C) of the Health and Safety Code.

5.04 As an alternative to or a supplement to enforcement of this Covenant, the County, DEH or any other County or State agency may elect to take any other regulatory or enforcement action authorized by law in response to any act done or omitted by any Owner on any part of the Property.

ARTICLE VI **VARIANCE, MODIFICATION, AND TERMINATION**

6.01 In General.

(a) This Covenant is for the benefit of the County in perpetuity, without conditions or limitations. This Covenant is not imposed by the County as an exercise of regulatory authority, nor is it reviewable in any court as a regulation, County regulatory act, or permit. This covenant is voluntarily made by the Owner of this Property to ensure that said Owner and subsequent Owners of this land do not endanger public health, safety or the environment by taking actions on this land that are not consistent with the contamination that has been left in place on this Property. The County has consented to be the beneficiary of this Covenant solely to ensure that the obligations and restrictions imposed by this covenant can be enforced by a public entity if necessary in response to a breach of the Covenant by the owner or a subsequent owner.

(b) This Article describes variance, modification and termination processes that an owner or subsequent owner of this Property may invoke under specified conditions. If these

processes are invoked, the County in its sole discretion may choose to conduct and participate in those processes in good faith, or the County may choose instead to presume the continued viability of this covenant unless and until the covenant is terminated or modified by a court of law at the request of the owner based on applicable state law.

(c) No decision of the County in connection with a variance, modification or termination request shall limit the rights of an owner or subsequent owner to seek relief from this covenant by any other means or on any grounds provided in state law.

6.02 Variance

(a) Any Owner may apply to DEH for a written variance from the provisions of this Covenant. Variance requests may seek approval of land uses or land activities that conflict with or that otherwise would not comply with the Restrictions and Requirements set forth in this Covenant, including those listed in Article IV.

(b) A variance is not a permit and the granting or denial of a variance from this Covenant is not a regulatory act. Any variance from the Covenant granted by the County or DEH is a voluntary decision by the beneficiary of this Covenant to forego enforcement of the Covenant to a defined and limited degree in a specific set of circumstances.

(c) DEH may determine procedures and conditions for considering variance requests in its sole discretion, either by written policy or on a case-by-case basis. For example and without limitation, DEH may require: that sufficient funds be deposited in advance to cover the estimated costs to DEH to process the variance request, and any past costs DEH or other County agencies have incurred in connection with the proposed project (e.g., to participate in the CEQA process before an application for a variance was submitted); that the applicant covenant not to sue and agree to hold harmless, defend and indemnify the County and related parties in connection with the variance request; that the applicant provide any information or analysis that DEH deems necessary; and that the applicant prepare or assist in the preparation of any reports or documents or drafts of reports or documents DEH deems necessary to comply with the California Environmental Quality Act (CEQA) or other state laws.

(d) Notwithstanding section 15096 of the CEQA Guidelines, in any situation in which the County is not the lead agency under CEQA for a proposed project that would require a variance, DEH may require any additional or supplemental analysis it deems necessary to adequately inform a DEH decision to grant or deny a variance.

(e) DEH may, in its discretion, issue or deny a variance. DEH will determine whether the applicant has demonstrated that under all the circumstances the land uses or land activities proposed within a variance request would not pose a threat to human health or the environment, or adversely affect any other part of the Property. DEH will base its decisions concerning the variance request on that determination.

(f) DEH may modify, limit or condition any requested variance. For example and without limitation DEH may condition a variance on further remedial activity that DEH deems necessary, or it may require that activities be conducted pursuant to an approved plan (e.g., a Soil Management Plan and a Health and Safety Plan) or in a specific manner.

(g) Prior to agreeing to issue a variance under this section, DEH or the County may, in its discretion, exercise any legal authority conferred upon it to require the variance seeker to perform further site assessment or site remediation activities. The existence, absence, or extent of such authority does not limit the County's absolute authority to grant, deny, or condition a variance from the Restrictions and Requirements of this Covenant.

6.03 Effects of a variance. A variance is not a revision to this Covenant. The County intends that issuance of a variance by DEH would entitle an Owner to assert related applicable defenses including equitable defenses to any attempt by the County to enforce this Covenant based on acts or omissions to act that were consistent with the issued variance.

6.04 Modification and Termination. Any Owner may apply to the County, through DEH, to terminate this Covenant as to any part of the Property, or to modify this Covenant by deleting a specific prohibition in paragraphs 4.01 or 4.02 of this Covenant. Subparagraphs (a) through (g) of paragraph 6.02 above shall apply to requests for termination or modification in the same manner they apply to requests for variances.

6.05 Notification to Department of Toxic Substances Control. The County will notify the Department of Toxic Substances Control (DTSC) within 30 days after the issuance or denial any variance, modification, or termination under this Article.

ARTICLE VII **MISCELLANEOUS**

7.01 No Dedication Intended. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof to the general public or anyone else for any purpose whatsoever. Further, nothing set forth in this Covenant shall be construed to effect a taking under federal or state law.

7.02 Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, with the County Recorder's Office for the County of San Diego within ten (10) days of the Covenantor's receipt of a fully executed original.

7.03 Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (2) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To Owner: Community Development Commission of National City
 1243 National City Blvd.
 National City, CA 91950-3312
 Attn: Redevelopment Director

To County Department: Department of Environmental Health
County of San Diego
1255 Imperial Avenue
San Diego, CA 92101
Attn: Site Assessment and Mitigation Division

Copy to: County Counsel
1600 Pacific Highway, Room 355
San Diego, California 92101
Attn: DEH Advisory

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph. After conveyance of this Property by the Covenantor future Notices shall be the responsibility of the owner of record as identified in the County Recorder's official books, and future notices to the person listed on the assessor tax role for any assessor parcel shall constitute adequate notice to the Owner of that part of the Property.

7.04 Partial Invalidity. If any portion of the Restrictions or other term set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

IN WITNESS WHEREOF, the Parties have executed this Covenant to be effective as of the date first written above.

CDC:

**COMMUNITY DEVELOPMENT
COMMISSION OF THE OF THE CITY OF
NATIONAL CITY**, a public body, corporate and
politic

By: _____
Ron Morrison, Chairman

ATTEST:

CDC Secretary

APPROVED AS TO FORM:

CDC Counsel

APPROVED AS TO FORM:

JOHN J. SANSONE, County Counsel

By

RODNEY F. LORANG, Senior Deputy

Attorneys for County of San Diego

STATE OF CALIFORNIA)
)ss.
COUNTY OF)

On _____, 200_, before me, _____, personally
appeared _____, personally known to me (or proved to me on the
basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within
instrument and acknowledged to me that he/she/they executed the same in his/her/their
authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or
the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

(SEAL)

STATE OF CALIFORNIA)
)ss.
COUNTY OF)

On _____, 200_, before me, _____, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

(SEAL)